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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BARBARA O. HAMBY,

Plaintiff and Appellant,

v.

MICHAEL HOVSEPIAN et al.,

Defendants and Respondents.

F077208

(Super. Ct. No. 14CECG01784)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Gilmore Magness Janisse and David M. Gilmore for Plaintiff and Appellant.

Whelan Law Group and Brian D. Whelan for Defendants and Respondents.

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Plaintiff Barbara O. Hamby sued defendants Michael and Linda Hovsepian[1] for breach of contract. Prior to trial, the breach of contract claim against Linda was dismissed. Following deliberation, as reflected in the special verdict form, three-quarters of the jury agreed Hamby and Michael never entered into a contract.[2] The trial court subsequently denied Hamby's motion for new trial.[3] On appeal, Hamby contends a contract existed between herself and Michael as a matter of law. She also contends the court erred by admitting certain evidence, instructing the jury on agency, and denying the new trial motion. For the reasons set forth below, we affirm the judgment.

BACKGROUND

I. Trial testimonies

a. *Hamby*

i. Direct examination

Hamby and her husband Roger Vehrs were friends with the Hovsepians. Sometime in the spring of 2009, the four "went driving around" after dinner. During the car ride, the Hovsepians showed Hamby and Vehrs several residential properties, including a foreclosed home on Stanford Avenue (hereafter, "Stanford property"). The Hovsepians mentioned they "needed some money" to purchase the Stanford property.

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1 In this opinion, we refer to defendants together as the Hovsepians and a particular defendant by his or her first name to avoid confusion. No disrespect is intended.

2 Hamby also sued the Hovsepians for fraud. As reflected in the special verdict form, the jury unanimously found neither Michael nor Linda made a false representation of fact to Hamby. On appeal, Hamby does not contest the verdict with respect to this cause of action. (See *Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1 [" 'A point not presented in a party's opening brief is deemed to have been abandoned or waived.' "].)

3 In her brief, Hamby states she filed both a new trial motion and a motion for judgment notwithstanding the verdict. However, only the former is in the record before us. (See *People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534 ["An appellate court's review is limited to consideration of the matters contained in the appellate record."].)

Following a conversation in the car, Hamby agreed to loan Michael $102,000 and he agreed to repay her over the next five years with 8-percent interest.

On May 12, 2009, Hamby wrote and signed a check for $102,000 and gave it to Michael. The word "Loan" was jotted down in the lower left-hand corner of the check. On the payee line, Michael's name alone was listed. The preprinted information in the upper left-hand corner displayed Hamby's name only as well as the following address: 2300 Tulare Street. Hamby testified the funds in this checking account were her "sole and separate property" and 2300 Tulare Street was Vehrs's work address, which was used because the couple "didn't have a mail receptacle at [their] home."

A few days after the check was handed over, Michael brought Hamby and Vehrs a promissory note and deed of trust, the latter of which identified Hamby as the beneficiary. Ultimately, the Hovsepians only made three separate payments of $8,160.

ii. Cross-examination

Counsel for the Hovespians asked Hamby, "In this car ride conversation that you had, you don't remember anything that Michael said during that ride, true?" (Boldface omitted.) Hamby replied, "As I said earlier, they took us around and talked about the homes they were buying or wanted to buy." Counsel then read aloud the following portion of the transcript of Hamby's April 8, 2016 deposition:

> " 'QUESTION. Okay. And did Michael telling you that he's going to repay you over five years, that was a conversation that took place in the car before you made the loan in May of 2009; is that right?
>
> " 'ANSWER. I believe all those terms were conversed in the car.
>
> " 'QUESTION. And in the car ride did Michael specifically tell you that he was going to repay – to pay you back over five years?
>
> " 'THE WITNESS. It's going to be the same answer.
>
> " 'QUESTION. You don't remember?

" 'ANSWER. The four of us were conversing. There was cross conversation. There was chatting going on in the front seat, the back seat. I don't recall exactly who said what.

" 'QUESTION. Okay. Do you remember, yes or no, if Michael . . . told you . . . I will repay a loan over five years, during that car ride conversation? Did that happen? Yes or no.

" 'THE WITNESS. There was a conversation in the car between the four of us. There was chatting in the front seat and the back seat between husbands and wives and cross conversations. And I don't recall who said what.

" 'QUESTION. Or whether Michael said five years or not, true?

" 'THE WITNESS. I don't know who said what. I don't remember. This was 2009.' "

The following exchange occurred:

"[Q.] That was also true of . . . Linda . . . , you don't remember what . . . Linda . . . said, it was this blur of cross conversation; is that right?

"A. Yes, it was a conversation that had taken [place] years ago. Like I said, there was a cross conversation. I don't remember who said what, but what I do remember at the end is that there was an agreement.

"Q. Okay. You just don't know who said what?

"A. No, I can't quote anybody exactly." (Boldface omitted.)

Hamby acknowledged her name did not appear on the promissory note. Counsel asked, "When was the first time that you saw [the promissory note]?" (Boldface omitted.) Hamby replied, "I don't recall exactly." Counsel stated, "Wasn't it true that the very first time you actually saw [the promissory note] was in 2016?" (Boldface omitted.) Hamby responded, "No." Counsel then read aloud the following portion of the deposition transcript:

" 'QUESTION. Take a look at Exhibit 3, please. Looking at Exhibit A of Exhibit 3 . . . . This is [the] titled note secured by deed of trust. Do you know – first of all, . . . have you seen Exhibit A before today?

" 'ANSWER. No.

" 'QUESTION. Today is the first time you have seen this note secured by deed of trust; is that correct?

" 'ANSWER. Yes.' "

The following exchange occurred:

"[Q.] The truth is that you didn't see any of these documents, the note or the deed of trust or anything, until you were first deposed last year; isn't that true? [¶] . . . [¶]

"[A.] They were handed to me by Mi[chael] at the very beginning, and I didn't look at them because I presumed they were what he said they were. And I handed them to my husband when we didn't receive that final payment."

Counsel asked Hamby, "The first time you saw the deed of trust was on April 8th, 2016; isn't that true?" (Boldface omitted.) Hamby replied, "Not really." Counsel then read aloud the following portion of the deposition transcript:

" 'QUESTION. Looking at Exhibit B to Exhibit 3, it's titled short form deed of trust and assignment of rents. Before today had you seen this document?

" 'ANSWER. No.' "

Hamby admitted she herself never contacted the Hovsepians after they defaulted.

b. *Michael*

Michael and Vehrs were close friends since the early 2000's. The latter was also the former's attorney. At trial, Michael testified he borrowed the money from Vehrs. He signed a promissory note, which listed Vehrs's work address, and deed of trust, which identified Hamby as the beneficiary. Michael delivered the documents to Vehrs at his law office. Shortly thereafter, per Vehrs's instructions, he went to Vehrs's residence and retrieved a check from under a doormat. Michael used the funds to purchase the Stanford property on May 15, 2009. He resold the Stanford property on June 30, 2010, for a

profit. In 2011, Vehrs surrendered the promissory note and deed of trust to Michael, who believed he was discharged of his obligation to repay the remainder of the loan.

Michael maintained he did not borrow the money from Hamby. He "never had any conversations about anything with [her] about [the Stanford] property ever." Michael noted "[t]here was a car ride with [Vehrs]" only, during which the men visited the Stanford property but "never discussed anything." He never gave the promissory note and deed of trust to Hamby. On the payee line of the checks Michael wrote to repay the loan, he listed Hamby's name "[b]ecause . . . Vehrs . . . asked [him]" to do so.

c. *Linda*

Linda testified she never asked Hamby or Vehrs for a loan and never conversed with either about purchasing the Stanford property. She also testified the car ride described by Hamby never happened. Linda added Vehrs previously represented her in a property transaction matter.

II. Jury instructions

At the jury instruction conference, Hamby's counsel objected to the trial court instructing the jury with CACI Nos. 3700 (Introduction to Vicarious Responsibility), 3705 (Existence of 'Agency' Relationship Disputed), and 3709 (Ostensible Agent). The court overruled the objection, stating "there are several things that came out through the evidence that could be argued to support the theory . . . Vehrs was . . . Hamby's agent and that she gave . . . Vehrs authority to act on her behalf."

Following closing arguments, the court read CACI Nos. 3700, 3705, and 3709:

> "[CACI No. 3700:] One may authorize another to act on his or her behalf in transactions with third persons. This relationship is called agency. The person giving the authority is called the principal. The person to whom authority is given is called the agent. A principal is responsible for harm caused by the wrongful conduct of her agent while acting within the scope of their agency or authority. An agent is always responsible for harm caused by his or her own wrongful conduct, whether or not the principal is also liable.

"[CACI No. 3705:] Michael . . . and Linda . . . claim that . . . Vehrs was . . . Hamby's agent and that . . . Hamby is, therefore, responsible for . . . Vehrs' conduct. If Michael . . . and Linda . . . prove that . . . Hamby gave . . . Vehrs authority to act on her behalf, then . . . Vehrs was . . . Hamby's agent. This authority may be shown by words or may be implied by the party's conduct. This authority cannot be shown by the words of . . . Vehrs alone.

"[CACI No. 3709:] Michael . . . and Linda . . . claim that . . . Hamby is responsible for . . . Vehrs' conduct because he was . . . Hamby's apparent agent. To establish this claim, either Michael . . . or Linda . . . must prove all of the following: One, that . . . Hamby intentionally or carelessly created the impression that . . . Vehrs was [her] agent; two, that Michael . . . and Linda . . . reasonably believed that . . . Vehrs was . . . Hamby's agent; and, three, that Michael . . . and Linda . . . were harmed because [they] reasonably relied on their belief."

The court also issued the following instructions, to which neither party objected:

"[CACI No. 5003 (Witnesses):] A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part or none of a witness's testimony.

"In deciding whether to believe a witness's testimony, you may consider, among other factors, the following: How well did the witness see, hear or otherwise sense what he or she described in court? How well did the witness remember and describe what happened? How did the witness look, act and speak while testifying? Did the witness have any reason to say something that was not true? . . . What was the witness's attitude toward this case or about giving testimony?

"Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes from what they remember. Also, two people may see the same event but remember it differently.

"You may consider these differences, but do not decide the testimony is untrue just because it may differ from other testimony. However, if you decide that a witness did not tell the truth about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness did not tell the truth about some

things but told the truth about others, you may accept the part you think is true and ignore the rest.

"Do not make any decision simply because there may have been more witnesses called by one side than the other. If you believe that it's true, the testimony of a single witness is enough to prove a fact. [¶] . . . [¶]

"[CACI No. 208 (Deposition as Substantive Evidence):] . . . During the trial you received deposition testimony that was read from deposition transcripts and shown by video. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was presented to you in the same way as you consider testimony given live here in court. [¶] . . . [¶]

"[CACI No. 300 (Breach of Contract—Introduction):] . . . Hamby claims that she and Michael . . . entered into a contract for payment of money. . . . Hamby claims that Michael . . . breached this contract by not paying money according to the terms of the promissory note. . . . Hamby also claims that Michael['s] . . . breach of contract caused harm to . . . Hamby for which Michael . . . should pay.

"Michael . . . denies that he ever entered into a contract with . . . Hamby, and further, that the contract he did enter into was with her husband, . . . Vehrs, and was forgiven when . . . Vehrs returned the original promissory note.

"[CACI No. 302 (Contract Formation—Essential Factual Elements)]: . . . Hamby claims that the parties entered into a contract. To prove that the contract was created, . . . Hamby must prove all of the following: One, that the contract terms were clear enough that the parties could understand what each was required to do; two, that the parties agreed to give each other something of value. A promise to do something or not to do something may have value. And, three, that the parties agreed to the terms of the contract.

"When you examine whether the parties agreed to the terms of the contract, ask yourself if under the circumstances a reasonable person would conclude from the words and the conduct of each party that there was an agreement. You may not consider the parties' hidden intentions. If . . . Hamby did not prove all of the above, then a contract was not created.

"[CACI No. 303 (Breach of Contract—Essential Factual Elements):] To recover damages from Michael . . . for breach of contract, . . . Hamby

must prove . . . [t]hat [she] and Michael . . . entered into a contract[, inter alia]. . . .

"[CACI No. 307 (Contract Formation—Offer):] Both an offer and an acceptance are required to create a contract. Michael . . . contends that a contract was not created because there was never any offer. To overcome this contention, . . . Hamby must prove all of the following: One, that . . . Hamby communicated to Michael . . . that she was willing to enter into a contract with [him]; two, that the communication contains specific terms; and, three, that based on the communication, Michael . . . could have reasonably concluded that a contract with . . . Hamby based on these terms would result if he accepted the offer. If . . . Hamby did not prove all of the above, then a contract was not created."

DISCUSSION

I. Existence of contract

" ' "Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.' " ' [Citation.] 'The manifestation of mutual consent is generally achieved through the process of offer and acceptance.' [Citation.]" (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 309.) " ' "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." ' [Citations.]" (*City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921, 930.) " ' " 'Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.' [Citations.]" [Citation.] "Where the existence of a contract is at issue and the evidence is conflicting or admits of more than one inference, it is for the trier of fact to determine whether the contract actually existed." ' [Citation.]" (*Pacific Corporate Group Holdings, LLC v. Keck, supra,* at p. 309.) "But if the material facts are certain or undisputed, the existence of a contract is a question for the court to decide." (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208.)

The record shows Michael received a check signed by Hamby for $102,000. Her name and Vehrs's work address constituted the preprinted information in the upper left-hand corner of the check and the word "Loan" was written in the lower-left hand corner. The promissory note listed Vehrs's work address while the deed of trust identified Hamby as the beneficiary. The checks Michael wrote to repay the loan were made payable to Hamby. At trial, Hamby testified she was the one who agreed to loan Michael the money; he agreed to repay her with interest in installments; they entered into the contract during a car ride in the spring in 2009; and he gave her and Vehrs the promissory note and deed of trust. At her 2016 deposition, however, Hamby could not recall "who said what" during the ride as there were "cross conversations" "between husbands and wives"; could not confirm that Michael specifically told her he would pay her back; and conceded she saw the promissory note and deed of trust for the first time at said deposition. The Hovsepians denied there was even a car ride and Michael asserted he borrowed the money from Vehrs. Contrary to Hamby's contention "there was a contract as a matter of law" between herself and Michael, the state of the evidence enabled the jury to reasonably infer she was not the individual who communicated a willingness to enter into a contract with him and thus conclude—in the absence of a valid offer—no contract was formed between them. (See Evid. Code, § 312, subd. (b) ["[T]he jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses . . . ."]; *Kleem v. Chapot* (1931) 112 Cal.App. 553, 556 ["It was the province of the jury to pass upon all questions of conflicting evidence or inconsistent statements, or the credibility of witnesses . . . ."].) Accordingly, we reject the notion the court should have advised the jury a contract between Hamby and Michael existed as a matter of law.

II. Evidentiary rulings and jury instructions

Next, Hamby contends the trial court erred by (1) allowing Michael to testify about Vehrs's out-of-court statements; (2) allowing the Hovsepians to testify that Vehrs was their attorney; and (3) instructing the jury on agency. According to Hamby, even

though "[t]here is no evidence that [she] did anything to even remotely suggest that Vehrs was her agent for purposes of dealing with th[e] promissory note," "[t]he erroneous instructions combined with the admission of hearsay and statements about Vehrs being [the] Hovsepian[s'] lawyer were . . . used to argue to the jury that Vehrs was [her] agent" and therefore had the authority to forgive the loan.

Assuming, arguendo, the trial court erred in the manner alleged by Hamby, "[n]o judgment shall be set aside . . . in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) Here, as reflected in the special verdict form, three-quarters of the jury concluded Hamby and Michael did not enter into a contract. This finding could have been attained without any reference to the contested testimonies and instructions. (See *ante*, at p. 10.) Moreover, as a result of this finding, the jurors never reached the question of whether Michael's "performance of the contract was excused or waived," which then would have required them to resolve whether Vehrs was Hamby's agent and authorized to cancel the debt. The purported errors were harmless.

III. New trial motion

"The standard of review of the denial of a motion for new trial is as follows: ' "[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.] However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as

substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order denying a new trial, . . . we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." . . . Prejudice is required: "[T]he trial court is bound by the rule of California Constitution, article VI, section 13, that prejudicial error is the basis for a new trial, and there is no discretion to grant a new trial for harmless error." [Citation.]' [Citation.]" (*Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 693-694, italics & fn. omitted.)

Hamby states the grounds for her new trial motion are "the same as the grounds for this appeal." As previously discussed, the state of the evidence enabled the jury to reasonably infer Hamby did not enter into a contract with Michael and the alleged evidentiary and instructional errors by the trial court were not prejudicial. Hence, we uphold the trial court's denial of the new trial motion.

DISPOSITION

The judgment and order of the superior court is affirmed. Costs are awarded to defendant Michael Hovsepian.

DETJEN, Acting P.J.

WE CONCUR:

SMITH, J.

MEEHAN, J.